IN THE

Supreme Court of the United States

No. .....

ORIN C. CLEMENT,

Petitioner,

vs.

TIGHE E. WOODS, HOUSING EXPEDITER,
OFFICE OF HOUSING EXPEDITER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Orin C. Clement, prays and respectfully petitions this Honorable Court that a writ of certiorari issue to review the decree and order of the United States Court of Appeals for the Sixth Circuit, rendered and entered on October 20, 1949, after a hearing on October 19, 1949, affirming the interlocutory decree of the District Court of the United States, for the Northern District of Ohio, Western Division, entered April 28, 1949.

No opinion was rendered by the Court of Appeals for the Sixth Circuit. The order of affirmance is contained in Appendix A.

Within twenty days under rule from the order of affirmance, petitioner moved on November 8, 1949 for the allowance of further time within which to complete and present his petition for a re-hearing. This was denied by order of November 9, 1949; application for stay of mandate, pending the filing of a petition in this court for a writ of certiorari, was filed November 9, 1949; motion to reconsider order denying further time to petition for re-hearing, and to grant motion to file same instanter, was filed November 22, 1949; order staying mandate for thirty days, pending the filing of a petition in this court for a writ of certiorari, was entered December 1, 1949; and order denying motion to reconsider and to present petition for re-hearing instanter was entered December 7, 1949.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is invoked under section 240 of the Judicial Code, amended: 28 U. S. C. A., 347(a).

The questions here presented for the consideration of this Honorable Court disclose that the United States Court of Appeals for the Sixth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court; has decided federal questions in a way probably in conflict with applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial procedure, or so far sanctioned such departure by a lower court, as to call for the exercise of this Court's power of supervision; and that this Court does have jurisdiction to hear and to determine the substantial federal questions here presented. (U. S. Supreme Court Rule 38 (5b).

Controlled Housing Rent Regulation, Sec. 825.8, 13 F. R. 5706, promulgated pursuant to the Housing and Rent Act of 1947, as amended, provides that maximum rents and

other requirements shall not be evaded, directly or indirectly, in any of the several ways set out therein. Sec. 825.8 is contained in Appendix B.

This action is predicated on said Sec. 825.8 (Record p. 54) of the Regulations. Under the Housing and Rent Act of 1947, as amended in 1948, and under Sec. 825.8 of the Regulations, the question of whether or not contracts for the sale and purchase of individual housing units in an apartment building in the possession of the owner constitute evasion, presents federal questions which have never been determined and are of vital importance to thousands of vendors and vendees on such contracts entered into within recent years for the sale of properties which, when rented, are and have been controlled housing. The Court of Appeals for the Sixth Circuit failed and refused to give consideration to the legal effect of such contracts. The District Court found that these contracts created a landlord-tenant relationship, and that the vendees were paying rent, although the contract (R. p. 55) discloses a completely integrated contract, embodying the complete understanding of the parties, without any evidence of any side or oral agreement differing therefrom or being the true contract, and when all of the vendees knew that they were buying and not renting.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The essential facts and claims of the respective parties are contained in the complaint and the answer, together with the affidavits filed by the parties. (R. p. 1-15.)

Petitioner is the owner of an 8 unit apartment building located at the corner of Fulton and Columbia Streets in Toledo, Ohio. Four units enter at the Columbia Street entrance and three at the Fulton Street entrance, and one at the side of the building opposite Fulton Street. (R. pp. 13,

81.) When rented, these are controlled housing accommodations. During the spring and summer of 1948, 3 apartments (numbers 6, 7 and 8) became vacant and were allowed to remain vacant and were not thereafter rented. (R. p. 13.) Apartments numbers 1, 2, 3, 4 and 5 were occupied by rent-paying tenants. At that time and for some time prior thereto, petitioner had been making efforts to secure rent adjustments to meet increased operating costs (R. p. 14). When these efforts were to no avail he, on August 6, 1948, gave notices to the five tenants in the building that he was withdrawing the apartments from the rental market, and requested possession at the end of sixty days. At irregular intervals, the five tenants receiving notices vacated and surrendered possession of the apartments they occupied (R. p. 13). Petitioner was then in possession of all the units of the building, and after, and as, he redecorated and reconditioned each apartment he offered it on the market for sale by contract, on a co-operative or joint ownership plan. This offer was made by a sign on the building, stating the terms and that it could be handled by contract. As each unit was redecorated and ready for occupancy, an advertisement was inserted in the local newspaper reading, "4 rooms, bath, can be handled by land contract, $60 monthly, adults, open 5 to 7 p. m. 2247 Fulton Street." People who were looking for apartments were called by telephone. On March 25, 1949, when the complaint herein was filed, petitioner had contracted for the sale of 6 units, 3 (apartments 1, 3 and 5) vacated and possession surrendered by tenants receiving notices, and 3 (apartments 6, 7 and 8) which petitioner had refused to rent over several months. The contract is set out in full in the opinion of the lower court (R. p. 55), in Appendix C.

Apt. No. 1 was sold by contract to Kenneth L. Cann.

Apt. No. 3 was sold by contract to Andrew Ro-

metski, who later transferred to Apt. No. 5, and Apt. No. 3 was then sold to Bruce J. Rommel.

Apt. No. 5 was sold to Andrew Rometski as above stated.

Apt. No. 6 was sold to George Sfaelos.

Apt. No. 7 was sold to John Allen Coxon.

Apt. No. 8 was sold to John Duffy.

All of the vendees entered into possession of their respective units under and by virtue of the contracts, after the contracts had been executed, signed, and delivered. None of them ever before lived in or occupied any apartment in the building.

Named in the comp'aint, Schedule A, (R. p. 5), besides the six contract vendees, are Mrs. Margaret Young and Mrs. Jessie S. Eastell, who were former tenants and not contract vendees. The claims respecting them are not involved in this appeal. The interlocutory order pertains to only the 6 contract vendees, but it is petitioner's contention that there is no equity in the claims respecting these 2 former tenants.

This cause was docketed in the United States Court of Appeals for the Sixth Circuit on June 8, 1949, with a complete record and full transcript of the evidence, and, at the same time, there was filed a motion to advance the cause for hearing. Not until June 23, 1949 was an order made advancing the cause to the next session in October. Being thus frustrated in securing a prompt hearing before the summer recess, as the law provides on appeal from an interlocutory order, (*Maxwell vs. Enterprise Wallpaper Manufacturing Company*, 131 F. 2d. 400) petitioner promptly, on June 25, 1949, filed a motion for a special hearing on the appeal, for the reasons that the order was improvidently made, the subject matter was beyond the jurisdiction of the Court, and the injunction without bond was a serious interference with petitioner's (appellant's) business of

selling his apartments. On July 12, 1949, the motion for special hearing was denied.

This cause came on for hearing in the Court of Appeals on October 19, 1949, and was decided on October 20, 1949 in a summary treatment of the important questions involved, on the authority of *Alabama vs. United States,* 279 U. S., 229, 231, affirming the order of the lower court. The order of affirmance, on the authority of *Alabama vs. United States,* shows that the Court of Appeals failed and refused to give consideration to the controlling and important questions in this dispute, but rested on the rule of law that generally, upon an appeal from an interlocutory order, the Court will not decide the merits, but simply determine whether the discretion of the Court below has been abused. Generally, the application of that familiar rule of law is proper and appropriate, for generally the granting or withholding of a temporary order is a preliminary step and the main case is yet to be tried on the adduction of further evidence. That rule of law, however, has several exceptions, as firmly established as the rule itself.

Where there are no facts in doubt, no further evidence to be adduced, supporting or contradictory, and there is before the Court only a question of law, the law not only guides but coerces discretion. (*National Picture Theatres vs. Foundation Film Corp.,* 266 Fed. 208.)

Here, it is conceded by respondent in his brief filed in the Court of Appeals (p. 25) that there is no dispute over or conflict in the evidence. The petitioner introduced no evidence. It is pointed out by the trial court, and conceded by the parties (R. pp. 16, 17, 18) that the issue in the cause, as it bears upon the interlocutory order can be decided upon the facts in the record, without the further adduction of evidence. The lower court says (R. p. 18) "but if that is the sole question in the case, and a determination as to its validity, I do not know why the facts that are required

by the Court to determine whether a preliminary injunction should issue, would not be all the facts that could be marshalled here, bearing on the question; and hence be determinative of the permanent injunction."

There is nothing in the record showing evasion. The execution of these contracts cannot constitute evasion unless there is shown to exist some side or oral agreement, differing from the written agreement, and that the written agreement was simply a "front." No such showing is made by the evidence before the Court, no evasion in law is shown, and there is no equity in the bill.

It is a well established rule of law that if on appeal from an interlocutory order the appellate court is of the opinion that the plaintiff was not entitled to an injunction because the bill was without equity, it will not only reverse the decree, but save both parties the expense of further litigation by a final disposition of the case, and in such case there can be no room for the exercise of discretion in granting the injunction.

Smith vs. Vulcan Iron Works, 165 U. S., 518;
Arkansas Southeastern Railway Co. vs. Union Sawmill, 154 Fed., 304;
Southern Express Company vs. Long, 202 Fed. 464;
Bissell Carpet Sweeper vs. Goshen Sweeper, 72 Fed., 545;
Mayor of Knoxville vs. Africa, 77 Fed., 501.

The trial court treated the recovery of possession of the housing units, not only of the 5 on which notices were given to the tenants but also of the 3 which had been vacant for several months, as evictions. (R. pp. 16, 60.) It assumes the "Rent Administrator" (Expediter) had some say on evictions (R. p. 16), and adopted his findings to that effect for his decision of evasion. There is no foun-

dation in law or equity for such treatment the Court gave the question and issue of evasion, and the decision of the Court was not an adjudication upon which the order now in dispute could rightly be based. It was a radical departure from the principles and practices of equity. The lower court clearly proceeded upon an erroneous hypothesis of pertinent facts and the law applicable to the issue of evasion.

Telephone & Telegraph Co. vs. City of Memphis, 200 Fed., 657.
Folk vs. United States, 23 Fed., 180.

Alabama vs. United States, supra, was no authority for the failure and refusal of the Court of Appeals for the Sixth Circuit to give this cause on appeal a full and considered review of the facts, as well as the law. It was the duty of the Court of Appeals to look into the complete record to see if the conclusion and decision was lawfully based, and if there existed a misapprehension of the law to the evidence.

Letcher vs. DeFoe, 151 F. 2d, 987;
Peebles vs. Prudential Ins. Co., 110 F. 2d, 76;
Maxwell vs. Enterprise Wallpaper Manufacturing Co., 131 F. 2d, 400.

The record shows and respondent concedes that there is no dispute in the evidence. Petitioner questions the competency of all of the evidence excepting that which might show a side or oral agreement, but there is no dispute in the evidentiary facts. On this record, the litigation should have been terminated in the Court of Appeals. There are no additional facts to be ascertained as pertains to the interlocutory order, and hence no reason for a trial on the merits simply to go thru motions of arriving at a permanent injunction on the same set of facts and at great expense to both parties.

A determination of this cause by this Honorable Court, on the appeal from the interlocutory order, clearly therefore does not involve the consideration of disputed evidence. The judgment of the lower court, affirmed by the Court of Appeals, is based squarely on the erroneous application of Sec. 209 of the Housing and Rent Act of 1947, as amended, which provides when an action or proceeding for possession can be lawfully maintained, whereas, as the record clearly shows in this case, there was no such action for possession of these units. It is a very important and vital question, for it involves thousands who have sold houses, duplexes, and apartments on the land contract plan. Sec. 209, and sub-sections, while not material, except to show what that section does *not* do or provide, are contained in Appendix D.

QUESTIONS PRESENTED

The fundamental question presented in this petition is whether, under the Housing and Rent Act of 1947, as amended, and the regulations promulgated in pursuance thereof, the Expediter has the power and authority to enjoin the sale by contract of individual accommodation units in an apartment building, when the units, though controlled housing units when rented, are withdrawn from the rental market, unoccupied and in full possession and control of the owner when contracted for sale, and when there was no court action to recover possession and when the contracts show a legal, enforcible, and completely integrated instrument, without any evidence of any oral or side agreement showing that some other agreement is the true contract.

As applied in particular to the section of the Regulations (Sec. 825.8) on which this action is predicated, which forbids the evasion of maximum rents and other require-

ments by certain acts and practices therein specified, the question is whether his acts constitute an evasion in law, when he is no longer renting, has possession of his property and contracts to sell his individual units, all things which avoid the Act and the Regulations, but which things he may lawfully do. The question is, can those acts constitute evasion?

There is the further question: how can this cause, predicated on evasion (Sec. 825.8), bring into play and consideration the good faith requisite provided in Sec. 209(a), to maintain an "action or proceeding" to recover possession of housing accommodations when there were no proceedings instituted at any time to recover possession of any housing accommodations?

Are not the trial court's findings, grounded on *Woods vs. Burg*, 82 Fed. Supp., 242, which was an action by the Expediter to enjoin the eviction of a tenant, and the application of the law of that case to the instant cause clearly erroneous, as being wholly inapplicable to the issue of evasion herein involved?

In considering the practical effect of the provisions of Sec. 825.8 of the Regulations in this cause, the grave and vital query arises: How can the findings and the decision square with constitutional provisions, guaranteeing the liberty of contract and the right to dispose of property, when the contracts disclose on their face a legal or enforcible instrument, embodying a legal and valid means of disposing of property, and when, by the terms of the contract, there is a clear intention to a complete integration, and when, further, there is no evidence of any side or oral agreement being the true contract.

REASONS FOR GRANTING THIS PETITION

1. The decisions of the Court of Appeals for the Sixth Circuit and the District Court have placed in jeopardy every existing contract for the sale of housing accommodations, whether a house, duplex, or multiple dwelling unit, and if allowed to stand unreversed is an invitation to thousands of purchasers under contract to seek to escape from their contracts for any one or more of hundreds of reasons. Under a law as far reaching as this decision, no one could safely buy or sell by contract without taking chances of trouble ahead. Unless these decisions are reversed, and the ruling of the lower court that these contracts are in effect leases and the vendees under the contracts are tenants in a landlord-tenant relationship, there will be no certainty of what interpretation will be placed on a contract, otherwise legal and enforcible by all parties, when it involves a controlled housing accommodation. The decision virtually outlaws sale by contract of controlled housing units.

What is there to prevent any vendee, or vendor for that matter, on such contract, from instituting an action to cancel the contract on grounds of fraud in being taken advantage of because he was only 29 years of age, had no stocks or bonds, and owned no other property and never had owned any, and was in dire need of a place in which to live, testimony to which effect was relied upon by the lower court in reaching its findings and decision. As a Federal Court case and ruling, it would be a powerful precedent and would undoubtedly be followed with disastrous results.

2. The written contracts for the sale of units in this apartment building conform to the laws of Ohio and the general form of, so-called, land contracts used and followed in Ohio. They are legal and enforcible instruments under

the laws of Ohio, dealing with a lawful subject, in a lawful manner—contracts for the sale of an interest in real estate. The legal status of such contracts is recognized and established in many statutory enactments in Ohio.

Gen. Code Ohio, Sec. 8621;
Gen. Code Ohio, Sec. 12236;
Gen. Code Ohio, Sec. 11902;
Churchill vs. Little, 23 O. S., 301, 307;
Bridgeman vs. Wells, 13 Ohio Rep., 43, 47.

These contracts, being legal instruments, establishing a certain relationship between the parties by agreement, and forming the basis of legal as well as equitable remedies, in what respect and how can these contracts constitute evasion?

> "It is said 'evade' connotes conduct which is fraudulent or characterized by artifice or craft, and suggests the idea of escaping or slipping away as opposed to resistance to or refusal to do military duty, which the Bund ordered counselled."
>
> Chief Justice Stone in *Keegan vs. U. S.,* 325 U. S., 478, 501.

> "A case is on one side of a statutory line or on the other. If it is on the safe side, it is none the worse legally because the full measure of what the law provides is availed of; to condemn one act as an evasion, it must be on the wrong side of the line, as indicated by the policy, if not the mere letter of the law."
>
> *Bullen vs. State of Wisconsin,* 240 U. S., 625.

The law recognizes a clear distinction between evading and avoiding the effects of a law or a regulation. In *Denning and Company vs. Fleming,* 160 F. 2d, 697, 701, the Court says:

> "It is too well settled to need any discussion or citation of authority that there is a difference be-

tween avoiding and evading the effects of a law or regulation. The regulation in question fixed a maximum price for sale of broomcorn in quantities greater than 14,000 pounds, and a higher price for sales of less than 14,000 pounds. In the absence of a provision in the regulation prohibiting split sales of less than 14,000 pounds to a customer whose requirements were greater, we know of no principle of law which would prohibit a vendor from selling only less than 14,000 pounds to a customer, even though that compelled the customer to place additional orders, *and when the only motive for such limitation was to obtain the higher price.* * * * Under these circumstances, we fail to see any evasion by an owner limiting sales to less than 14,000 pounds." (Emphasis supplied.)

See also *Woods vs. White,* 172 F. 2d, 356, where the court had under consideration this same section, 825.8, of the Regulations, on which this action is predicated.

In *Tudor Arms Apartments, et al. vs. Wilson Shaffer, et al.,* 62 A. 2d, 346, reversing a declaratory judgment of a trial court, in an action by tenants resisting eviction, where possession was sought to sell as cooperative units, it was held that bona fide sales of individual units cannot be termed evasion. In the course of the opinion, page 348, it is said:

"We think, however, that the solution cannot turn upon the form of the transaction. It is true that the plan is somewhat novel in this state, and that its obvious purpose is to effect a change of occupants, in the event that the present tenants decline to purchase stock in the enterprise. But, on the other hand, the essence of the transaction is that in exchange for a capital investment a prospective purchaser will obtain a right, under the proprietary lease, to occupy a particular unit for an indefinite period, during good behavior. When all of the stock is disposed of, the promoters will be out of the pic-

> ture, and the management will be in the hands of the stockholders. This was some of the most important indicia of ownership. *It could hardly be contended that the sale of a house to a group of tenants in common would not be within the exception.* From the nature of the subject matter, ownership under a cooperative plan must take the form of rights incident to stock ownership or membership in a corporation. The substantial nature of these rights, rather than the form of the transaction, must be considered * * * ." (Emphasis supplied.)

Under the facts in this case and the applicable law, it seems incredible that a finding of evasion could be reached. There is no evidence of concealment or covering up some facts to escape any lawful duty. The matter of these contracts for sale was public information. Respondent (plaintiff), in August, 1948, which was before tenants receiving notices had vacated, knew that the notices had been given (R., p. 14) and that the 3 vacant apartments were being offered for sale by contract. This action was not filed until March 25, 1949, 7 months afterwards.

When these contracts were executed, delivered, and transactions completed by delivery of possession, petitioner (defendant) was without any duty to the respondent (plaintiff). The units had been withdrawn from the rental market, the old tenants under rentals had vacated, and the apartments were without occupants. With respect to these accommodations, all duty of petitioner (defendant) to the respondent (plaintiff) had completely ceased. The accommodations were not subject to controlled housing rent regulations, excepting as rented units and when rented. By not renting, petitioner (defendant) avoided that duty; but that is not evasion. He refused to use the property for the purposes controlled by the Act and the Regulations, and that is not evasion. He chose to be free of any duty

to the respondent (plaintiff) under the law and the regulations, and the law is clear that he cannot be required to rent, and may utilize his property for any purpose, including the sale by individual apartments. That is not evasion.

Petitioner (defendant) is clearly on the safe side of the statutory line in this cause, for he owes no duty to the respondent (plaintiff) under Sec. 825.8 of the Regulations, or otherwise, and his legal right to sell or contract to sell is so fundamentally established that it cannot be open to question. Petitioner's (defendant) position is none the worse legally, because he has availed himself of the full measure of the law, and refused to rent, but has sold by contract and thereby divorced himself completely and effectively from respondent's (plaintiff) controls. The policy and letter of the law specifically provide for just what petitioner (defendant) has done by contracting for the sale of these accommodations, and petitioner submits that under the law these facts cannot constitute evasion. He was simply getting out of the rental business, not by evading the law, but by availing himself of it.

3. It is manifest that the findings and decisions of the lower court are not based on the law of evasion, which is the sole issue presented in considering these contracts. The lower court reached out into the wholly unrelated domain of eviction, action for possession, and the good faith prerequisite for such action, to arrive at the findings and decision. That is a radical departure from the usual course of judicial procedure. It injects an issue, false in the facts on which it is based and in the law applicable.

There were no "actions or proceedings" instituted for possession of these units. The record is clear on that. There is no contention that there were any such actions for possession, and the absence of any such action for posses-

sion makes wholly inapplicable any consideration of Sec. 209 of the Housing and Rent Act of 1947, as amended, 1948. That provision of law goes no further than to forbid the maintenance of any action or proceeding for possession unless the provisions in the various subsections are complied with.

The District Court, however, in reaching its decision and making its findings, placed complete reliance on *Woods vs. Burg,* 82 Fed. Supp., 242, (R. p. 60) which was an action by the Expediter to enjoin the eviction of a tenant. Burg had instituted an action to secure possession of a unit in an apartment house, and *Woods vs. Burg* involved the determination of whether the action for possession by Burg was in good faith, as provided in Sec. 209(a)(5). If it was found to be in good faith, Burg could proceed with his action or proceeding for possession. If not in good faith, it was a bar to that action or proceeding. The bar acts directly on the action or proceeding. Sec. 209 had application only in causes of action or proceedings for possession. Obviously, *Woods vs. Burg* is wholly inapplicable to the issue of evasion in this cause, and has not the slightest bearing on that question. To decide a cause predicated on evasion, on law applicable to an action for possession, when no such action for possession is pending, and no such facts are present in the cause, is very irregular to say the least. The ruling of the court applies alike and with equal force to the three controlled units (apartments Nos. 1, 3, 5) on which notices were given (R. p. 14) and the 3 contracted units (apartments Nos. 6, 7, 8) which had been vacant for several months, without notice. These decisions, if established as the law of the land, clearly outlaw the sale by contract of individual controlled housing units. Relying on *Woods vs. Burg, supra,* for the decision was clearly erroneous and an abuse of discretion which should have been considered by the Court of Appeals for the Sixth Circuit.

Sec. 209 of the Housing and Rent Act of 1947, as amended, contains all that Congress considered necessary to provide in the Act respecting the recovery of possession of housing accommodations, and it must be assumed that Congress intended to do just what was done. It is significant that, at the same time, Sec. 209 was enacted, the respondent was by the same Act shorn of all powers over the recovery of possession which he had under the Emergency Price Control Act of 1942. From these concurrent acts, it seems clear from the history of the Congressional action in enacting the law and the 1948 amendment, that Congress intended (1) to place no further restrictions on recovering possession than provided in Sec. 209: that is, when an "action or proceeding" to recover possession has been instituted, certain essentials (sub-sections) are a necessary prerequisite, and (2) to provide a way for the landlord to get out of the rental business.

The report of the Senate Committee considering this legislation is in part:

> "With respect to the provision authorizing the recovery of possession for the demolition and for withdrawal from the rental market, the committee felt it was unreasonable to require the landlord to continue to operate his facilities if he seeks in good faith to 'get out of the business'."
>
> Senate Report No. 896, 80th Congress, 2nd Session, p. 13, *et seq.*

and again:

> "The net result is that through this procedure, a landlord may be compelled to continue in the business of renting housing accommodations, despite his desire to cease that business. While to this extent the landlord is treated as if he were engaged in a public utility, as the 1947 Act is administered, he is not assured of the opportunity to make a reasonable profit. Sec. 205" (found in the law as Sec. 209) "and Sec. 302 are intended to remedy this

situation by allowing a landlord in good faith to regain possession of his housing accommodations if he in good faith desires to withdraw them from the rental market, and by providing that he shall not be required to offer them for rent."

94 Congressional Record, p. 1515.

4. If it can be seriously contended that Sec. 825.8 of the Regulations can be interpreted to mean that contracts for the sale of controlled housing units on a cooperative or joint ownership plan, legal and enforcible on their face, constitute evasion of the Act and the Regulations, and prevent the owner from disposing of his property, then the Act and the Regulations do violence to the 5th and 14th amendments to the Constitution of the United States, as well as to Article 1, Section 1, of the Constitution of the State of Ohio.

Life, liberty, and property are the most sacred rights possessed by a citizen, and come to us as an inalienable right from our English ancestry, adopted into and guaranteed by our Constitution. Flowing from these rights, is the liberty of contract, so long as the uses and purposes designated in the contract are not in conflict with public interest, and the absolute right to acquire, hold, and dispose of property in conformance with lawful provisions.

"Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraint but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner."

Ward vs. Maryland, 12 Wall. 418-127.

"Property is more than a mere thing which a person owns. It is elementary. It includes the right to acquire, use, and dispose of. The Constitution protects these essential attributes of property."

U. S. vs. Carolene Products Co., 7 Fed. Supp. 500.

The only restriction upon these rights and liberties is the requirement that whatever the subject matter of the contract, it must not on reasonable grounds be against public interest or harmful to public order, or detrimental to common good.

Adair vs. U. S., 208 U. S., 161.

The owners of real estate have the right under the Constitution to use, lease, or dispose of it for any lawful purpose.

Terrace vs. Thompson, 263 U. S., 197.

It seems incomprehensible that the legality of these contracts is challenged. Illegal in what respects? The formal requirements meet the laws of Ohio, and in that field Ohio laws are supreme and control.

Hicks vs. Nicholas, 6 F. 2d, 10.

The subject matter is real estate, which cannot be coupled with any hurtful intent to the public.

Thus, the decision below and the findings are reached on the false premise and facts of the presence of actions to recover possession under Sec. 209 and the law applicable to that section, instead of on the issue of evasion, on which the cause is predicated, with the inconceivable result that, as the law in the case now stands, petitioner is enjoined from disposing of his property.

PRAYER

Wherefore, the petitioner prays that a *writ of certiorari* be issued by this Court, directed to the United States Court of Appeals for the Sixth Circuit, to the end that said order of affirmance and judgment of the United States Court of Appeals for the Sixth Circuit in the case of Orin C. Clement, petitioner herein, vs. Tighe E. Woods, Housing Expediter, Office of Housing Expediter, respondent herein, in cause No. 10,940, be reviewed by this Court, as provided by law, and upon such review by this Court said judgment and order of affirmance be reversed and said preliminary injunction be ordered dissolved, and for such other and further relief as to this Court may seem proper and appropriate.

ORIN C. CLEMENT,
302 Columbia Street,
Toledo 10, Ohio.

APPENDIX A

No. 10,940

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Orin C. Clement,

Appellant,

vs.

Tighe E. Woods, Housing Expediter,

Appellee.

ORDER

Before Allen, Martin and Miller, Circuit Judges.

This case came on to be heard upon the record and briefs and oral argument of appellant;

And it appearing that the findings of fact of the District Court are amply sustained by the record, and that the discretion of the District Court was not improvidently exercised in the issuance of the temporary injunction complained of (Alabama vs. United States, 279 U. S. 229, 231):

The order of preliminary injunction entered April 28, 1949, is affirmed.

Approved for entry:

(s) Florence E. Allen,
Circuit Judge.

Filed October 20, 1929.

APPENDIX B

Rent Regulations for Housing, 13 F. R. 5706, Section 825.8

"Sec. 825.8—Evasion—(a) General—The maximum rents and other requirements provided in Sec. 825.1 to 825.72 inclusive shall not be evaded either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing, or by tying agreement, or otherwise."

APPENDIX C

Opinion of District Court, excepting the review of the testimony of witnesses.

The Court: This matter comes before the court on a Motion for Preliminary Injunction which reads in part as follows:

"Plaintiff moves the court for a Preliminary Injunction:

"1. Enjoining defendant, his agents, servants, employees and all persons in active concert or participation with defendant from:

"(a) Soliciting, demanding, accepting or receiving any rent in excess of the maximum rent prescribed by the Controlled Housing Rent Regulation as heretofore or hereafter amended, or in excess of the maximum rent permitted by any other Regulation or Order heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, extended or superseded.

"(b) Committing any other violation of the said Act or Regulation or as it may be amended, extended or superseded."

The motion follows the filing of a complaint in which the plaintiff alleges, among other things, Paragraph 6:

"During the periods set forth and on the occasions stated in Schedule A, defendant has demanded, accepted and received as rental for controlled housing accommodations sums in excess of the maximum legal rents, which maximum legal rents are as set forth in Schedule A."

The action appears to be predicated upon Regulation 825.8, which reads as follows:

"The maximum rents and other requirements provided * * * shall not be evaded, either directly or indi-

rectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing or by tying agreement, or otherwise."

It appears that the defendant in this case was before this court in 1947, and perhaps about the last month of that year judgment was entered in this court after hearing on a complaint alleging overcharges of rent. Some time thereafter, the defendant, the owner of the same premises involved in the 1947 litigation, served notice upon the tenants in the building that he desired them to vacate the premises. That was in August, I believe, of 1948, and by the close of the year, all of them had vacated the premises.

In the fall of the year, possibly as early as September, advertisements were published in the local newspaper under the heading of "Apartments for Rent" in which the defendant extended notice to the public that he was the owner of certain apartments for which he desired tenants, possibly by way of purchase. I don't recall whether that was included in the notice. Anyhow, in response to that advertisement certain young persons made their appearance at the headquarters of the defendant, and were there presented with a form of contract which I desire to read. That contract, as indicated by the one extended to Kenneth L. Cann, one of the persons who entered into the contract, reads as follows:

"Land Contract

"Articles of Agreement, made and concluded the 29th day of November, 1948, between Orin C. Clement, of the first part, and Kenneth L. Cann, of the second part,

"First. The said party of the second part, for him-

self and his heirs, executors, administrators, successors or assigns, promises, covenants, and agrees to pay to said party of the first part, his heirs and assigns, the sum of Seven Thousand Five Hundred Dollars ($7,500.00) in the manner following, to-wit: Two Hundred Dollars ($200.00) if not already paid, then concurrently with and upon the execution of this instrument: a further minimum sum of $75.00 upon taking possession of the premises herein described, which shall not be later than five (5) days after the date hereof, and a like minimum sum of $75.00 on the 29th day of each and every month thereafter, until the contract price is paid in full, with interest at the rate of one per cent (1%) per annum from the date hereof, computed semi-annually upon the unpaid balance of the principal obligation and charged against the monthly payments in advance of reduction of principal.

"Second. In consideration of the above and the fulfillment of all and singular the covenants contained in this agreement to be performed and kept, and upon the fulfillment of each and every one of them by the said party of the second part, in the manner and at the time specified herein (time and promptness of payment being of the essence of this contract) the said party of the first part agrees to sell and convey by sufficient warranty deed, unto the party of the second part, his heirs and assigns:

"The individual dwelling unit, Apartment #1, forming a part of and being on the first floor of the Ashton apartments, located and situated upon the following lot or parcel of land, to-wit: Part of lot 14 in Machen's Addition to the City of Toledo, Lucas County, Ohio.

"It is understood and agreed by the parties hereto that $20.00 of the aforesaid monthly installment payment shall be applied to the maintenance, operation and management expenses, taxes, insurance, and including the cost of heating the building, keeping the halls, the exterior of

the building and the grounds in good condition, placing and removing screens and storm doors, providing janitor service for cleaning, removing garbage and rubbish, the cost of city-provided water, and maintaining in good working condition all heating, plumbing and electrical equipment, excepting any repairs made necessary by the acts of the party of the second part, and party of the first part shall not be required at any time to give an accounting of the expenditures or application of said $20.00.

"The balance of said monthly installment payment shall be applied to the discharge of the principal contract obligation.

"Party of the second part has the option to pay any amount at any time in reduction of the principal obligation of this contract. And in the event party of the second part pays in full his principal obligation of this contract, then in that event, until all others purchasing under like contracts of purchase have paid in full, he or she shall pay monthly only the amount of $20.00, representing his or her share of the maintenance and operating costs of said building.

"Third. It is understood and agreed by the parties that except as above provided, party of the second part shall make and do the needed repairs and decorating in the apartment of the party occupies under this agreement, but until the terms of this agreement are fulfilled, and said party is the legal owner, he or she shall make no structural alterations of walls, partitions or otherwise, in the interior of said apartment, and after the fulfillment, no such alterations shall be made which will weaken or harm the structural supports of any part of the building or in any manner affect the halls, porches, exterior walls, or other individual apartments in said building; but such alterations, if any, shall be limited entirely in effect and appearance to the interior of the apartment occupied and owned by the party.

"Fourth. All fixtures and equipment in said apartment remain the property of the party of the first part during the life of this contract, to become the property of the party of the second part by duly executed instrument or transfer, only upon the faithful performance and fulfillment of the terms of this contract.

"Fifth. Party of the second part acquiesces in the power and authority of party of the first part in his sole and unqualified discretion during the life of this contract and in fulfillment of the terms herein set forth, to manage and control the functioning of said apartment building, providing the necessary services, maintaining the equipment, and meeting the operating expenses.

"Sixth. It is agreed that, upon the fulfillment of the terms of purchase by party of the second part, and by all others purchasing apartments in said building under like contracts of purchase, party of the second part shall be entitled to receive from party of the first part, sufficient warranty deed conveying to said party of the second part, legal title to individual dwelling unit, Apartment No. 1, in said building, and the undivided ⅛ interest in the whole property, but not to include any part of any of the other individual dwelling units therein.

"Seventh. It is agreed that upon the fulfillment of the terms of this contract by party of the second part, and by others purchasing dwelling unit apartments in said building under like contracts of purchase, expense items of taxes, repairs, and other expenses common to the upkeep of said building shall be assumed and paid by the owners of the individual apartment units in proportion to the purchase price of each individual dwelling unit of said building.

"Eighth. If party of the second part, his heirs, executors, administrators, successors or assigns shall fail to

make any of the payments pursuant to this agreement, either of principal or interest, and be in default for ten (10) days, or in any other manner breaks the condition of this contract, then in that event the party of the first part is hereby given an option either to declare the entire balance of the purchase price due and payable and enforce his vendor's lien for payment thereof, or to rescind this contract to sell and convey said premises, and take possession thereof; and, in the event of the exercise of the option to rescind this contract, any and all payments theretofore made by party of the second part, shall be taken and retained by party of the first part as and for liquidated damages for the non-performance of this contract, and party of the first part, his heirs, executors, administrators, successors or assigns shall be entitled to the possession of the premises aforesaid, and party of the second part covenants and agrees that he and all persons holding under him shall and will surrender possession thereof to party of the first part, his heirs, executors, administrators and assigns, and, party of the second part hereby authorizes any attorney at law to appear in any court of record of competent and proper jurisdiction if party of the second part is in default for ten (10) days, and waives the issuing and service of process, and confess a judgment of restitution against said party of the second part in favor of party of the first part, together with costs of suit, and thereupon to release all errors and waive all right of appeal. Failure or delay to exercise said option at the time of any default shall not be or operate as a waiver of the right to exercise such option at any time thereafter. Party of the second part agrees that a notice, duly mailed by registered mail, to said party of the second part at 302 Columbia Street, Toledo, Ohio, or delivered personally, shall be sufficient notice of the exercise of said option.

"Ninth. It is understood and agreed by the parties hereto that the premises conveyed by this contract shall

be used as a residence only, and that no business or commercial activities of any kind or nature shall be conducted or permitted therein, and that no loud or disturbing noises or nuisances shall be permitted or suffered on said premises.

"It is agreed that party of the first part may possess a pass-key for entry to said premises in case of need of repairs to fixtures or equipment or in other cases of emergency, and no locks shall be changed without providing party of the first part with pass-key for entry.

"It is agreed that in the event of the birth of a child to party of the second part, this contract is automatically cancelled and held null and void when the child reaches 18 months of age unless in the meanwhile party of the second part has found some party without children, agreeable to party of the first part, to take over this contract and continue the payments and the terms of same.

"Party of the second part agrees to conform to all reasonable rules and regulations for the proper and uniform operation of services about said premises, to the end that friction may be eliminated and smooth operation of such service functions assured.

"This contract is executed in duplicate, and constitutes the full and complete agreement between the parties, and it is agreed by the parties hereto that no change or alteration of, or addition to, the foregoing terms and conditions, and no assignment, sale, pledge or transfer of this contract, or subletting of said individual dwelling unit, shall be in any manner binding upon said party of the first part unless first consented to and in writing endorsed on both copies of this contract.

"In Witness Whereof, The said parties have hereunto set their hands the day and year first above written.

"(Signed) Kenneth L. Cann
"Orin C. Clement."

There appears to be no requirement or no plan followed whereby these offers to purchase, as they are designated on the form attached thereto, are to be recorded, and hence so far as the public is concerned there is no encumbrance by way of such a contract upon the title of the defendant to the property.

The question of course was immediately raised in the mind of the court as to the good faith with which such a proceeding was followed by the defendant, for, after having caused the eviction from the premises of the rental tenants who were in there up to and shortly after August of 1948, the defendant then proceeded to advertise and receive inquiries from certain individuals and to enter into this form of contract with them for the occupancy of the premises; and because of the fact of the good faith there involved, the court was interested in listening to testimony of parties of the second part who entered into these contracts, with a view to determining the position that they were in at the time they entered into those contracts, as well as what was in the mind of the defendant from things that were said at the time of the execution of the contract with relation to the form of contract that was being entered into, all going to the question of good faith.

The court has examined the case of Woods vs. Burg et al., found in 82 Federal Supplement at page 242. This is a case that came before the United States District Court in Minnesota. Opinion was rendered on September 28, 1948. It was a decision by Chief Judge Nordbye on a motion for a preliminary injunction. The syllabus reads as follows:

"Where it appeared that group purchase plan for apartment building was conceived as a plan to evade Housing and Rent Act, and that some of prospective purchasers had been told that they could default at any time they de-

sired without further obligation, temporary injunction would be issued enjoining attempt to evict any of the tenants who had refused to enter into so-called purchase arrangement."

Quoting from the opinion of the judge:

"* * * However, in this case the original defendants, Mayme Burg, Walter Burg, John Burg, and Jacob T. Dosch, were the owners or agents for the owners, of the apartment building in question, and early this year the Housing Expediter brought these proceedings to restrain them from violating the Housing and Rent Act of 1947, and for the restitution of certain rent overcharges and other relief. An interlocutory injunction was granted on the petition of the Expediter on or about February 2, 1948. On July 13, 1948, this court made its order permitting plaintiff to file a supplemental complaint wherein certain additional defendants were joined, all of whom had entered into alleged contracts for the purchase of the apartment building referred to in the original complaint and who threatened eviction proceedings against certain of the tenants of the housing accommodations in said building.

"Plaintiff then instituted this motion on the supplemental complaint and on the evidence adduced at said hearing to restrain the original and the additional defendants from attempting to evict any of the tenants who had not entered into the so-called purchase arrangements. In support of his motion, plaintiff relies in part on Section 8(a) of the controlled Regulation, which provides:"— and then the judge quotes Section 825.8, which I have earlier in this oral opinion quoted, and he proceeds:

"This group purchase was conceived as a plan to evade the Housing Act, and some of the prospective purchasers were told that they were not entering into a binding contract for deed, but that they could default at any time they desired without any further obligation. In fact, some of them considered the transaction as one of rent rather

than purchase. Others may have vaguely thought that they were purchasing an apartment and that their interest in the real estate was the apartment allocated to them, distinct, separate and exclusive from any other apartment assumed to have been sold to any other purchase. Apparently, the first attempt of the original owners was to sell the apartments on a separate apartment plan; that is, instead of purchasing an undivided interest in the building, each purchaser assumed to buy an apartment as such. Later, however, this plan was cancelled and that type of a transaction was abandoned, and separate contracts for deed were made out by the Burgs and Dosch to some 14 purchasers assuming to sell an undivided 1/14 interest in the building to each purchaser. However, these contracts were not completed before this motion was instituted by the Housing Expediter to enjoin any eviction proceedings by reason of the so-called sale of the apartment building to these purchasers. And at the time this motion was heard by the court, it did not appear that these purchasers had obtained any legal or equitable title to the building. In any event, their contracts have not been delivered so as to consummate a completed transaction. It seems indubitable, therefore, that when this transaction of the Burgs and Dosch was contemplated and entered into with the purchasers, it was conceived and perpetrated in direct violation of Section 8(a) of the Controlled Regulation, and any steps that were taken by the parties thereafter to change the transaction from the purchase of separate apartments in the building to the purchase of an undivided interest in the premises did not absolve the defendants from the taint of the original scheme and plan.

"On this showing, therefore, I am of the opinion that the temporary injunction should be granted as prayed for. Findings of fact and conclusions of law in harmony herewith may be presented.

"An exception is allowed."

APPENDIX D

Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881 et seq.)

Sec. 209(a). No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless—

(1) under the law of the State in which the action or proceeding is brought the tenant is (A) violating the obligation of his tenancy (other than an obligation to pay rent higher than rent permitted under this Act or an obligation to surrender possession of such housing accommodations) or (B) is committing a nuisance in such housing accommodations or using such housing accommodations for an immoral or illegal purpose or for other than living or dwelling purposes;

(2) the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations;

(3) the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser;

(4) the landlord seeks in good faith to recover possession of such housing accommodations (A) for the immediate purpose of substantially altering or remodeling the same for continued use as housing accommodations, or for the immediate purpose of conversion into additional

housing accommodations, and the altering, remodeling, or conversion cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be required by Federal, State, or local law for the alterations, remodeling, or any conversion planned, or (B) for the immediate purpose of demolishing such housing accommodations;

(5) the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such; or

(6) the housing accommodations have been acquired by a State or any political subdivision thereof for the purpose of making a public improvement and are rented temporarily pending the construction of such improvement."

(b) "Notwithstanding any other provision of this Act, the United States or any State or local public agency may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered; Provided, That nothing in this subsection shall be deemed to authorize the maintenance of any such action or proceeding upon the ground that the income of the occupants of the housing accommodations exceeds the allowable maximum unless such income, less any amounts paid to such occupants by the Veterans' Administration on account of service-connected disability or disabilities, exceeds the allowable maximum."

(c) "No tenant shall be obliged to surrender possession of any housing accommodations pursuant to the provisions of paragraph (2), (3), (4), (5), or (6) of subsection (a) until the expiration of at least sixty days after written notice from the landlord that he desires to recover possession of such housing accommodations for one of the purposes specified in such paragraphs."

IN THE

Supreme Court of the United States

No. 525

ORIN C. CLEMENT,

Petitioner,

vs.

TIGHE E. WOODS, HOUSING EXPEDITER,
OFFICE OF HOUSING EXPEDITER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORIN C. CLEMENT,
302 Columbia Street,
Toledo, Ohio.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

I

Contrary to respondent's contention that "the main question before the District Court was one of fact, *viz.*, were the alleged contracts of sale employed by petitioner merely a device to evade the maximum rent provisions of the Act and the Regulations," the question before the trial court was one of mixed law and fact—undisputed facts. *Bell vs. Porter,* 159 F. 2d, 117, cert den. 330 U. S., 817; *Becker vs. Loew's, Inc.,* 133 F. 2d., 889, cert. den. 319 U. S., 772.

Here is involved a written contract, a valid, subsisting contract for the sale of an interest in real estate, containing provisions of complete integration, unattacked for fraud, accident or mistake, establishing under the laws of Ohio a certain relationship between the contracting parties, into which relationship the respondent intrudes himself without any authority for so doing, in the absence of some direct, relevant, and substantial proof of the existence of another or side agreement being the real contract. The record reveals no such side agreement or any intimation of such, even from the mouths of the contracting parties who testified, and who would be expected to reveal such if any existed.

When a District Court undertakes to determine the existence or validity of an alleged contract, whether in findings of fact or conclusions of law, it makes a legal determination which the Court of Appeals is competent to make, and may make, notwithstanding Rule 52(a). *Bach vs. Friden Calculating Machine Co.*, 155 F. 2d., 361, 364.

The facts here are not in dispute and are largely documentary. The Appellate Court is as able as the trial court to draw inferences and conclusions, and is not bound to accept findings of the trial court. *U. S. vs. So. Georgia Ry. Co.*, 107 F. 2d., 3; *Stubbs vs. Fulton National Bank of Atlanta*, 146 F. 2d., 558, cert. den. 325 U. S., 864; *In re Chicago & Northwestern Ry.*, 110 F. 2d., 425; *Hummel Bros. Co. vs. Serrick Corporation*, 122 F. 2d., 470.

Documentary construction and consideration is herein involved, and it was the duty of the Appellate Court to study the evidence and ascertain whether it was of *quantum* and persuasiveness required, and resolve the question of law presented. *Chain O'Mines vs. United Gilpin Corporation*, 109 F. 2d., 617, cert den. 311 U. S., 659; *Chatz vs. Armour Plant Emp. Credit Union*, 154 F. 2d., 236, cert. den.

329 U. S., 728; *Harris Stanley Coal & Land Co. vs. Chesapeake & Ohio Ry.*, 154 F. 2d., 450, cert. den. 329 U. S., 761; *Sun Insurance Office, Ltd. vs. Be-Mac Trans. Co.*, 132 F. 2d., 535.

"* * * Where the ultimate finding is a conclusion of law, or a determination of a mixed question of law and fact, it is subject to judicial review, and the duty of the Circuit Court of Appeals is to provide a real review." *Becker vs. Loew's, Inc., supra.*

The petition filed herein, and the record (R. pp. 74, 75), discloses petitioner's challenge to the findings of fact by the trial court and the erroneous view of the law adopted and applied by the trial court in reaching the decision complained of. The substance of the evidence, which is largely irrelevant and incompetent as being offered to vary the legal effect of written contracts, is clearly lacking in probity and wholly insufficient to support the findings of ultimate facts, and is based upon a misconception of the applicable law. These are root factors which the Court of Appeals was, in law, required to examine and resolve—a duty when that challenge is made—but which that court refused to accept and resolve, on the erroneous view of the law that by Rule 52(a) of the Rules of Civil Procedure the review court would not consider the merits. The Circuit Court of Appeals completely overlooked the rule of law that where the evidentiary facts are not in dispute, and there is documentary construction involved, bringing in a question of law, Rule 52(a) has no application, since the Appellate Court is just as able as a trial court to form its inferences and conclusions. The findings having been challenged, it was the duty of the Appellate Court to afford petitioner a real examination and review.

Failing in its duty in these respects, by its summary and perfunctory treatment of petitioner's appeal in the

Appellate Court, and ignoring the law's requirement for a careful and considered appraisal of the evidence, respondent cannot, petitioner submits, very cogently contend that the concurrence of the two lower courts in the findings cannot be here assailed. It is true that concurrent findings by a District Court and by a Circuit Court of Appeals will receive great weight, especially when the evidentiary facts have received a careful examination but "the rule that concurrent findings of the two lower courts are persuasive in support of their judgments does not relieve this court of the task of examining the foundation of findings in particular cases," and "cannot be deemed unreviewable 'finding of fact,' " for "though labelled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this court." *Baumgartner vs. United States,* 322 U. S., 665, 670, 671.

There is here no disagreement over the evidentiary facts, irrelevant and incompetent though much of it may be, but there is a sharp difference of view as to the import of the evidence and its reliability in arriving at the ultimate facts and conclusions of evasion. This involves the departure of the trial court from the accepted and usual course of judicial procedure, in basing the finding and decision on the law pertaining to evictions, in an action which is predicated upon evasion, when, as the record shows, there were no evictions; admitting testimony of the contracting parties to vary the terms and legal effect of completely integrated instruments; and constitutional rights respecting contracts for, and the disposition of, property. These are important and far reaching issues, and "when we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the

two-court rule a serviceable guide." *United States vs. Appalachian Power Co.*, 311 U. S., 377, 404.

Manifestly then, the finality of respondent's 'short' answer, that the finding concurred in by two courts "will be accepted here without examination of the evidence," and that therefore the trial court's finding of a landlord-tenant relationship is not reviewable by this court, finds no support in law or in reason. In this connection, in view of respondent's contention respecting the finality of concurrent findings of two courts, it is interesting to note that, in both the above cases cited by petitioner, this court not only re-examined the evidence and arrived at different findings and conclusions, but, at the same time, reversed in each instance the two courts. Obviously, the extreme view of respondent is not supported in law as a general rule. It doubtless has application in certain particular cases.

II

Petitioner readily concedes that, within the scope of the authority granted, the meaning and application of the Housing and Rent Act and Regulations, in fact all Acts of Congress, are controlled by federal law. That is the supreme law of the land. That is elementary.

But the state law creates legal rights and legal interests, that is, the legal status and relationship of the parties, controls the acquisition and disposition of real estate and any interest therein, the modes of conveying and encumbering it, and the burdens to be imposed upon it, within, of course, constitutional guaranties. *Arndt vs. Griggs*, 134 United States, 316, 320, 321; *Credit Finance Corporation vs. Hale & Perry, Inc.*, 66 F. 2d., 357.

The Congress only acts upon or legislates concerning that status, right, or relationship as it is found or exists, but cannot enlarge upon or construe that right or status

into something different. The substance and the actuality cannot be altered to bring it within the scope of the enactment.

Respondent fails to distinguish between the right of interpretation, on the one hand, and the scope of the authority granted, on the other hand. One is the right of judicial action, and the other is the denial of that right.

As applied in particular in the field of federal income taxes, this distinction is made clear. The federal law controls in determining if the status or thing created by state law is the status or thing intended to be acted upon, no matter what that thing or status may be called, as long as the substance is there. *Morgan vs. Commissioners,* 309 U. S., 78.

But the state law governs in determining those rights, the status and relationship created, to see if it is the status or thing intended to be acted upon. *Crooks vs. Harrelson,* 282 U. S., 55; *Poe vs. Seaborn,* 282 U. S., 101.

Clearly, the federal law cannot arbitrarily, or otherwise, fix or find the status of these contracts or the relationship and rights created thereunder different from what the Ohio law establishes that status and the rights thereunder to be. That would be creating rights, and in that field the Ohio law is supreme.

Applicable in this connection, though conversely stated, is the observation of the court in *Crooks vs. Harrelson, supra,* (p. 60):

> "Courts have sometimes exercised a high degree of ingenuity, in the effort to find justification for wrenching from the words of the statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of judicial power and that of the legislative power as

to call rather for great caution and circumspection in order to avoid usurpation of the latter."

Manifestly, there is no support in law for respondent's contention that "the District Court could properly find that these agreements were sham, not consummated in good faith, and constitute an evasion of the federal Act, even though they were technically valid under the state law," since these contracts of sale establish a certain relationship, equitable ownership in the vendees (*Credit Finance Corp. vs. Hale & Perry, Inc., supra*), with equitable remedies created in both parties. That status is fixed by the Ohio law, and though Congress may enact legislation, within constitutional guaranties, affecting that status or relationship, it must give way to the legality of that status thus established by the local law. Any finding by the trial court of sham or lack of good faith is clearly erroneous in invading the exclusive field of the state created rights.

This is not saying that the court could not find from the substance, the subject matter of the instrument itself, that it is not a contract for the sale of an interest in land because it did not contain the necessary legal requirements and elements for such a contract, or that it was not the real contract—the evidence showing another side agreement being the true contract. But petitioner does insist that, in an action predicated upon an evasion in the execution of these contracts, the pretended claims of sham and lack of good faith are wholly at variance and inconsistent with the rights created by state law. In such an action, good faith, purpose, and motive are not involved or material. The question is, is it a legal instrument, does it create a legal status—and by the state law.

III

Respondent here concedes that petitioner "could sell his accommodations after the tenants in occupancy had vacated" on notices of the withdrawal of the units from the rental market. Lawful possession of the accommodations, then, being in petitioner, precludes any question of the right of possession under Sec. 209 or the application of a good faith requirement for possession thereunder.

This manifestly concedes the error of the trial court's conclusion, that there were evictions in violation of Sec. 209 (R. pp. 16, 60) and that *Woods vs. Burg,* 82 F. Supp. 242 was authority for a finding of lack of good faith, when there was no question of good faith before the court to which the statutory provision of good faith could apply. Respondent cannot concede the right of possession to sell without, at the same time, conceding that Sec. 209, with its provision of good faith, and *Woods vs. Burg, supra,* are wholly inapplicable in this action, based on evasion, and that the finding of the lack of good faith is a clearly erroneous application of the law.

In view of this clear and admitted misapplication of a provision of law respecting evictions, to support a finding of evasion, it is an extreme and distorted claim to urge or pretend that these contracts of sale were a re-offering of the accommodations upon the rental market, and a re-renting, when in law they create definite and established legal and equitable rights in real estate.

The finding of the trial court concurred in by the Court of Appeals, without a real examination and review of the issue involved, a mixed question of law and fact, cannot preclude the consideration of this cause by this court.

IV

Respondent seems to be in confusion regarding petitioner's contention respecting Section 209 of the Act of 947, as amended in 1948.

Petitioner has no thought that this action was brought nder Sec. 209 or involves any eviction proceedings, but in complete agreement with respondent that this action brought under Sec. 206(b) of the Housing and Rent Act 1947, as amended in 1948, (Public Law 464), as alleged the complaint (R. p. 2), and is to restrain the petitioner om demanding or receiving more than the established aximum rent. What petitioner does contend is that Sec. 9 has no relevancy or bearing upon the issue of evasion this cause, and is here erroneously considered because spondent injected its consideration into the cause by king for the temporary injunction on the authority of, and ing to the trial court at the time of the hearing. *Woods Burg, supra.* The trial court granted the temporary junction on the authority of *Woods vs. Burg* (R. p. 60) ough no eviction or action or proceeding for possession s involved.

This was clearly erroneous and a clear misapplication the law to the facts. Evasion by these contracts is the e issue, to which issues good faith, motive, or purpose wholly irrelevant.

This action was filed March 25, 1948, (R. p. 60), and acts and occurrences transpired while the Act of 1947, amended in 1948, was in force and effect. The amendnt in 1949 took effect April 1, 1949, and has no bearing effect upon the issue in this cause.

V

Here, again, we meet respondent's extreme and untenable position that the findings of the court, that these contracts of sale constitute rentals, are final. Naturally, of course, if these contracts were merely rentals, these accommodations would be subject to the Act. That is too well established by now to need the citation of authority, but that is beside the question here.

Petitioner challenges the findings, and asserts that they are made on an erroneous apprehension of the law to the facts, and are not supported by substantial evidence, and are made in an action predicated on evasion, on the law applicable to actions for possession of rental accommodations, with no consideration given to the applicable law pertaining to evasion, and asserts that this is a radical departure from usual judicial procedure.

These findings prevent petitioner from disposing of his property in the manner he desires. If these findings are erroneous, as petitioner claims, he has then been denied his constitutional right to dispose of his property. It is to test these findings in the light of applicable law, and to determine what law is applicable, that this review is requested.

As brought out under heading "I" herein, that presents a reviewable question which entitled petitioner to a real examination and review by the Court of Appeals, which he did not receive for reasons similar to the reasons respondent now urges why this Court should not grant a review.

CONCLUSION

Whether the decision of the court below is right is the question petitioner seeks reviewed. That is the question for the court. It is hard to think of a question of

more importance than one involving the right to sell housing accommodations or other controlled housing by contract. The court will take judicial knowledge of the fact that thousands of all classes and types of properties are sold by land contract, and many of these contracts may be involved in court actions at the instance of the vendors or vendees, or perhaps this respondent, as in the instant cause. The precedent set by the law finally made in this cause is manifestly of great importance, if not to the respondent, certainly to those who may be affected by this decision.

Furthermore, the decision as it now stands is in sharp conflict with *Denning & Company vs. Fleming,* 160 F. 2d., 697 (C. C. A. 10), as well as *Woods vs. White,* 172 F. 2d., 356 (C. C. A. 2). The decision has the effect of conflicting with the Parole Evidence Rule, against the introduction of oral testimony to vary the legal effect of a written instrument. Had this rule been observed, the trial court's consideration would not have been diverted to the question of good faith in connection with eviction cases under Sec. 209, interpreted in *Woods vs. Burg, supra,* and relied upon by the court, but would have been confined to the single issue of evasion and a consideration of these contracts in that connection under applicable law. For these reasons, petitioner is entitled to a re-examination and review, and therefore the petition for a writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

ORIN C. CLEMENT,
302 Columbia Street,
Toledo, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 525

ORIN C. CLEMENT, PETITIONER

vs.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court has not been published but is contained in the Record (R. 54-69). The opinion of the Court of Appeals (R. 89) is published in 177 F. 2d 376.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1949 (R. 89). The petition for a writ of certiorari was filed on January 3, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the court below properly held (1) that the findings of fact of the District Court, that petitioner resorted to "contracts of purchase" as a means of evading the maximum rent ceilings established by the Act and Rent Regulation, are amply sustained by the record, and (2) that the District Court did not abuse its discretion in issuing a temporary injunction under Section 206(b) of the Housing and Rent Act of 1947, as amended.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Housing and Rent Act of 1947, as amended (50 U.S.C. App., Supp. II, 1881 *et seq.*), and the Controlled Housing Rent Regulation (12 F.R. 4331) are set forth in the Appendix, *infra,* pp. 12-16.

STATEMENT

Petitioner is the owner of housing accommodations located in Toledo, Ohio. This action was brought by the Housing Expediter to enjoin petitioner, pursuant to Section 206(b) of the Housing and Rent Act of 1947, as amended, from violating the Act and for restitution of alleged overcharges (R. 2-5). Simultaneously, with the filing of the complaint, the Housing Expediter applied for a temporary injunction restraining petitioner from collecting rent in excess of the maximum rent established by the Act and the regulations, and from violating the Act in any other manner (R. 6-9). Petitioner's answer denied the charges of vio-

lation; asserted the court lacked jurisdiction; and claimed in substance that he was not renting the housing accommodations involved herein, but rather had sold them, and that the persons who presently occupied them, did so under "contracts of purchase" (R. 10-15).

The application for a temporary injunction came on for hearing before the District Court. At this hearing, the Housing Expediter offered the testimony of six of the alleged purchasers (R. 23-53), summarized in part in the opinion of the District Court (R. 63-64). Petitioner did not take the stand nor call witnesses in his behalf, but cross-examined plaintiff's witnesses. At the conclusion of the hearing, the trial court held "that the contracts entered into were not entered into in good faith by the [defendant]" but "were entered into for the purpose of receiving a $200 down payment wholly above and beyond the rental ceilings provided, and of receiving thereafter monthly payments wholly above and beyond the fixed rental ceilings * * * in violation of the law" (R. 65-66).

The court entered findings of fact and conclusions of law (R. 76-78), in which it found that petitioner was the landlord of the housing accommodations in question, situated in the Toledo, Ohio. Defense-Rental Area (Paragraphs 5-6, R. 76); that petitioner had entered into contracts of sale with six different persons involved in the case, "all

of which contracts were not entered into in good faith" (Paragraph 7, R. 77); that the persons named, except one George Sfaelos, were personally occupying the accommodations as tenants, and the monthly payments being made by them to petitioner constituted rent (Paragraph 8, R. 77); that petitioner had violated the Act and Section 825.8 of the Controlled Housing Rent Regulation, its evasion provisions (Paragraph 9, R. 77); and that he had received and was receiving money from the several tenants named in excess of the maximum legal rent allowed by the Act and the Rent Regulation (Paragraph 11, R. 77). Based upon these findings, the court likewise concluded that it had jurisdiction of the parties and of the subject matter (Paragraph 1, R. 77); that the Act prohibited collection of rent in excess of the maximum rents (Paragraph 2, R. 78); and that petitioner should be temporarily enjoined from receiving unlawful rents and from adopting any scheme for evading the Act and the Rent Regulation. The District Court thereupon entered an order of preliminary injunction to that effect (R. 79).

Upon appeal, the Court of Appeals affirmed upon the ground that the findings of fact of the District Court "are amply sustained by the record, and that the discretion of the District Court was not improvidently exercised in the issuance of the temporary injunction complained of" (R. 89).

ARGUMENT

The decision of the court below is correct and there is no conflict of decisions. The questions which petitioner seeks to raise are either firmly settled by the decided cases or of no general importance; they consist largely of issues of fact which have been resolved against him by the concurrent findings of the two lower courts.

1. The record contains no support whatever for petitioner's assertion that the rulings below have "placed in jeopardy every existing contract for the sale of housing accommodations * * * and if allowed to stand unreversed is an invitation to thousands of purchasers under contract to seek to escape from their contracts * * *." (Pet. 11). The ruling below is limited solely to the specific and novel facts and circumstances of the instant case.

The Housing and Rent Act of 1947 fixed maximum rents in those defense-rental areas which on March 1, 1947, were under rent control pursuant to the Emergency Price Control Act of 1942 (50 U.S.C. App. 901 *et seq.*). Such rents were to be the O.P.A. maximum rents which were in effect on June 30, 1947, and the Act forbade the demand for, or receipt of, rents in excess thereof (Section 204(b) 50 U.S.C. App., Supp. II, 1894 (b)). Pursuant to Section 204(d) of the Act, which authorized the issuance of regulations and orders deemed necessary to carry out the provisions of the Act, the Housing Expediter issued the

Rent Regulation, which among other things declared that the maximum rents shall not be evaded either directly or indirectly "by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase * * * or by tying agreement, or otherwise" (Sec. 825.8(a), *infra,* p. 16).

The main question before the District Court was one of fact, viz: were the alleged contracts of sale employed by petitioner merely a device to evade the maximum rent provisions of the Act and the Regulation. The court in a comprehensive opinion which carefully reviewed the contract of sale and the testimony in the case (R. 54-69) found as a fact that petitioner's contracts "were not entered into in good faith;" that petitioner was actually the landlord of the premises in question; that the persons named were occupying the accommodations as tenants; that the monthly payments being made by them to petitioner constituted rent; and that petitioner had violated the Act and Section 825.8 of the Regulation in receiving from the tenants money in excess of the maximum legal rent (R. 76-77). Petitioner concedes that "there is no dispute in the evidence" (Pet. 8), and the Court of Appeals held that the findings of fact of the District Court are "amply sustained by the record" (R. 89). These findings of fact by the District Court, concurred in by the Court of Appeals, are normally unassailable here. *Virginian Ry.* v. *Federation,* 300 U. S. 515; *Alabama Power Company* v. *Ickes,*

302 U. S. 464, 477; *United States* v. *O'Donnell,* 303 U. S. 501; *Allen* v. *Trust Co.,* 326 U. S. 630, *Comstock* v. *Group of Investors,* 335 U. S. 211, 213-214.

Petitioner urges, however, that "it seems incredible that a finding of evasion could be reached" (Pet. 14). The short answer to this contention, at this stage, is that this was a question of fact for the trial court, and where that court has found evasion to be present, and its finding has been concurred in by the Court of Appeals, the conclusion so reached "will be accepted here without reexamination of the evidence" (*Allen* v. *Trust Company,* 326 U. S. at 636). No "very exceptional showing of error" is attempted, or could be made, as the District Court's opinion suffices to prove (R. 54-69).[1]

In particular, the attempt to rely upon the form of sale[2] does not help petitioner, since the trial court found as a fact that a landlord-tenant rela-

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[1] Moreover, the burden of showing error in findings supporting a preliminary injunction, as is the case here, is particularly heavy. Cf. *Alabama* v. *United States,* 279 U. S. 229, 231.

[2] The sham character of the so-called contract of sale may be illustrated by the fact that one purchaser, Duffy, was already in default (R. 46). By the terms of the sales contract, at any time, petitioner could void the contract as to Duffy, whether he continued to pay or not (Par. 8, R. 59). If Duffy continued to pay for ten years, and petitioner then exercised his rights under the contract and rescinded, all other purchasers, even though paid up, could not get title to the premises, since the contract by its terms provided that title would not be delivered until (1) all the payments had been made by the purchaser, and (2) all the payments had been made by all the others (Par. 6, R. 57).

It should also be noted that petitioner advertised the housing accommodations in a newspaper under the heading "Apartments for Rent Unfurnished" (R. 24, 55).

tionship was created in each instance (R. 76-77). "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law." *United States* v. *San Francisco,* 310 U.S. 16, 28; see, too, *United States* v. *Masonite Corp.,* 316 U.S. 265, 281.

2. As for the contention that the written contracts for the sale of units in petitioner's apartment building conform to the laws of Ohio, and were enforceable contracts for an interest in real estate in Ohio, that fact, if it be a fact, is not decisive in this proceeding. Although the incidents of title may be governed by state law, the meaning and application of the Housing and Rent Act and the regulations issued thereunder are controlled by federal law. *Schwabacher* v. *United States,* 334 U.S. 182, 188-189; *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 123; *Case* v. *Bowles,* 327 U.S. 92; *Woods* v. *Petchell,* 175 F. 2d 202 (C.A. 8); *Woods* v. *Krizan,* 176 F. 2d 667 (C.A. 8). The District Court could properly find that these agreements were sham, not consummated in good faith, and constituted an evasion of the federal Act, even though they were technically valid under state law.

3. Petitioner also argues that the particular units involved in this case had been withdrawn from the rental market, the old tenants had vacated, the apartments were without occupants, and that

therefore he was without any duty under the Housing and Rent Act. It is true that petitioner had the right, under Section 302 (*infra,* p. 15), not to offer his accommodations for rent, after the earlier tenants had moved out, and that the accommodations were not subject to the Rent Regulation except as rented units. It is also true that petitioner could have sold the accommodations after the tenants in occupancy had vacated. But once petitioner re-offered the housing accommodations upon the rental market, they again became subject to the Act and the Regulation. This is what the lower courts have found to be the case. Obviously, petitioner could not in the guise of a sale continue to rent the housing units at rentals in excess of the legal maximum.

4. Petitioner also seems to think that the present action was brought under Section 209 of the Act of 1947, prior to its amendment in 1949 (*infra,* pp. 14-15), dealing with eviction proceedings instituted for possession of accommodations, and that since this is an action not for possession but to restrain petitioner from charging more than the lawful rent, Section 209 is not applicable. Petitioner misconstrues the basis for the jurisdiction conferred upon the court in this case. The action is brought under Section 206(b) of the Act (*infra,* p. 14) to restrain further violations on the part of petitioner in demanding and receiving more than the estab-

lished lawful rent. The right of the District Court to enjoin such violations under Section 206(b) of the Act is now beyond dispute, and the plain words of that section, coupled with Section 206(a) (*infra*, pp. 13-14), leave no room for argument on that score.

5. Finally, it is contended that if the Rent Regulation can be construed to mean that contracts for the sale of controlled housing units "legal and enforcible on their face, constitute evasion of the Act and the Regulations, and prevent the owner from disposing of his property, then the Act and the Regulations do violence to the 5th and 14th amendments to the Constitution of the United States, as well as to Article 1, Section 1, of the Constitution of the State of Ohio." (Pet. 18). But it is plain that no constitutional rights were offended in this case. If, as the trial court found, the proposed sales of housing accommodations were, in fact, rentals of housing accommodations, then petitioner, like other landlords subject to the Act, could charge no more than the lawful rental for the accommodations. Prohibitions of the evasion of this duty are clearly valid, and follow from the lawfulness of the maximum rent restriction upon the use of rental property in a period of emergency. *Woods* v. *Miller Co.*, 333 U.S. 138; *United States* v. *Shoreline Cooperative Apartments, Inc.*, this Term, No. 334; *Bowles* v. *Willingham*, 321 U. S. 503.

CONCLUSION

The decision of the Court below is clearly right and does not involve any question of substantial importance. There is no conflict of decisions and further review is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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FEBRUARY, 1950.

APPENDIX

1. The pertinent provisions of the Housing and Rent Act of 1947, 61 Stat. 193, 50 U.S.C. App., Supp. II, 1881 *et. seq.*, as amended by Public Law 422, 80th Cong., 2d Sess., approved February 27, 1948, Public Law 464, 80th Cong., 2d Sess., approved March 30, 1948, and Public Law 31, 81st Cong., 1st Sess., approved March 30, 1949) are as follows:

* * * * *

SEC. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of June 30, 1950.

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, and subsections (h) and (i), during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: * * *

(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary

to carry out the provisions of this section and section 202 (c).

* * * * *

SEC. 206.[3] (a). It shall be unlawful for any person to demand, accept or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent pre-

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[3] This section was amended by section 205, Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 203, Public Law 464, 80th Congress, this section read as follows:

"SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204 or otherwise to do or omit to do any act in violation of any provision of this title.

"(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

The original section read as follows:

"SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

"(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

scribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

SEC. 209.[4] Whenever in the judgment of the Housing Expediter such action is necessary or proper in

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[4] This section was amended by section 206, Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 204, Public Law 464, 80th Congress, this section read, in part, as follows:

"SEC. 209. (a) No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless—

"(1) under the law of the State in which the action or proceeding is brought the tenant is (A) violating the obligation of his tenancy (other than an obligation to pay rent higher than rent permitted under this Act or an obligation to surrender possession of such housing accommodations) or (B) is

order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act.

* * * * *

SEC. 302. Nothing in this Act or in the Housing and Rent Act of 1947, as amended, shall be construed to require any person to offer any housing accommodations for rent.

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committing a nuisance in such housing accommodations or using such housing accommodations for an immoral or illegal purpose or for other than living or dwelling purposes;

"(2) the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations, or for the immediate and personal use and occupancy as housing accommodations by a member or members of his immediate family, or, in the case of a landlord which is an organization exempt from taxation under section 101 (6) of the Internal Revenue Code, or the immediate and personal use and occupancy as housing accommodations of members of its staff: *Provided*, That in the case of housing accommodations in a structure or premises owned or leased by a cooperative corporation or association no action or proceeding under this paragraph or paragraph (3) to recover possession of any such housing accommodations shall be maintained unless stock in the cooperative corporation or association has been purchased by persons who are then stockholder tenants in occupancy of at least 65 per centum of the dwelling units in the structure or premises and are entitled by reason of stock ownership to proprietary leases of dwelling units in the structure or premises; but this proviso shall not apply where such corporation or association acquires or leases such structure or premises after the effective date of the Housing and Rent Act of 1948 pursuant to a contract entered into prior to such date;

"(3) the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the im-

2. Section 825.8(a) of the Housing Expediter's Controlled Housing Rent Regulation (12 F.R. 4331) provides as follows:

SEC. 8. *Evasion*—(a) *General.* The maximum rents and other requirements provided in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing, or by tying agreement, or otherwise.

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mediate and personal use and occupancy as housing accommodations by such purchaser;

"(4) the landlord seeks in good faith to recover possession of such housing accommodations (A) for the immediate purpose of a substantially altering or remodeling the same for continued use as housing accommodations, or for the immediate purpose of conversion into additional housing accommodations, and the altering, remodeling, or conversion cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be required by Federal, State, or local law for the alterations, remodeling, or any conversion planned, or (B) for the immediate purpose of demolishing such housing accommodations;

"(5) the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such; or

"(6) the housing accommodations have been acquired by a State or any political subdivision thereof for the purpose of making a public improvement and are rented temporarily pending the construction of such improvement."

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IN THE

Supreme Court of the United States

No. 525

October Term, 1949

ORIN C. CLEMENT,

Petitioner,

vs.

THOMAS E. WOODS, HOUSING EXPEDITER,
OFFICE OF HOUSING EXPEDITER,

Respondent.

PETITION FOR RE-HEARING AND RE-CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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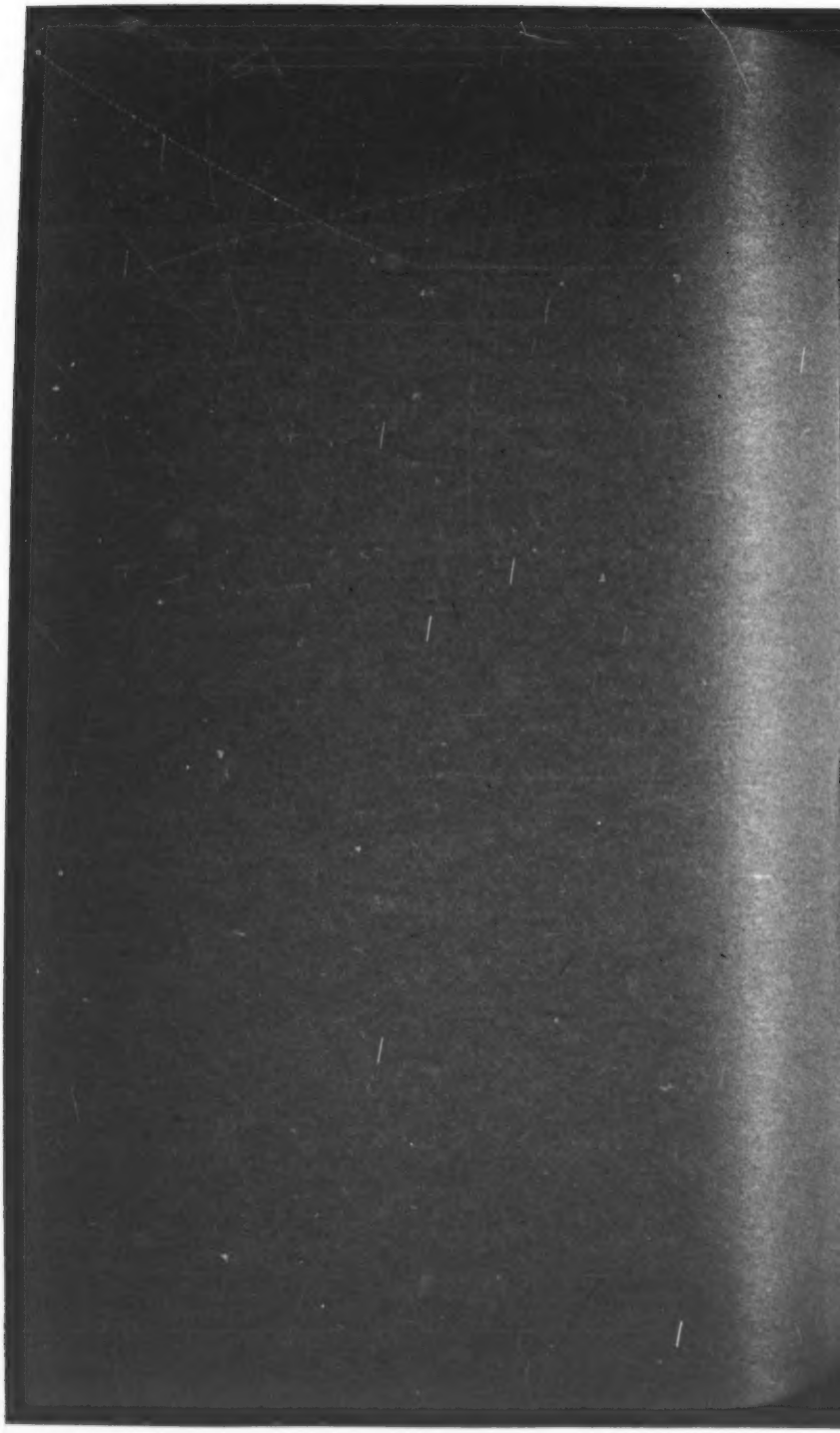

IN THE

Supreme Court of the United States

No. 525

October Term, 1949

ORIN C. CLEMENT,

Petitioner,

vs.

TIGHE E. WOODS, HOUSING EXPEDITER,
OFFICE OF HOUSING EXPEDITER,

Respondent.

PETITION FOR RE-HEARING AND RE-CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORIN C. CLEMENT,
302 Columbia Street,
Toledo, Ohio.
Attorney for Petitioner.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Orin C. Clement, respectfully submits that he is aggrieved by the Court's denial, on March 13th, 1950, of his petition for a *writ of certiorari* to the United States Court of Appeals for the Sixth Circuit to review and examine the order of the Court of Appeals for the Sixth Circuit, which affirmed the interlocutory order of the trial court, and prays for a re-hearing and re-consideration of said petition.

I

Petitioner is not advised of the reason or reasons for the denial of the petition for a *writ of certiorari,* but submits to this Honorable Court that whatever these reasons were and are they cannot surmount the inescapable fact and conclusion that, by this interlocutory order, petitioner has been and is deprived of his right to sell his property according to his will. He sold by a method legal in Ohio. At the instance of the respondent he was stopped by the interlocutory order of the trial court.

In his petition-brief, and in his reply brief (filed March 9, 1950, timely, it is hoped, to have received the Court's consideration), petitioner asserts the unconstitutionality of any restraint on his right to sell and dispose of his property, and he has no intention of here rehashing and restating the fundamental principles and the argument there presented.

He does, however, direct the Court's attention to the fact that Congress, long ago, saw fit to recognize, strengthen and further protect these constitutional safeguards and rights in enacting the Civil Rights Act of April 9th, 1866, 8 U. S. C., Sec. 41, 42:

> "41. Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. 1977.
>
> "42. Property rights of citizens. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens

thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S. 1978."

These are plain, unambiguous, specific provisions of law, and enacted by Congress to carry into effect the Fourteenth Amendment adopted in 1868, establishing the equality of rights of all citizens, and, while it was designed primarily to secure to the colored race the rights, privileges and responsibilities of citizenship, it, at the same time, placed the stamp of nullity on every law, ordinance and regulation which abridged the principles and immunities granted by the Constitution. *Twining vs. New Jersey,* 211 U.S., 78; *Palko vs. Connecticut,* 302 U.S., 319; *Adamson vs. California,* 332 U.S., 46.

These constitutional privileges and immunities are the wards of this Court, which, as the interpreter of the Constitution, guards the beneficiaries thereof against unlawful encroachments. That responsibility and duty, this Court will always meet with appropriate action to safeguard those rights. In recent years, civil rights questions have frequently been before the Court and, while by far the greater number of them have involved racial questions, yet all were concerned with constitutional privileges and safeguards which apply alike to all persons and all citizens. *Betts vs. Brady,* 316 U.S., 455; *Turney vs. Ohio,* 273 U.S., 510; *Corrigan vs. Buckley,* 271 U.S., 325; *Hill vs. Texas,* 316 U.S., 400.

In *Hill vs. Texas, supra.,* where the court had under consideration trial procedure as affecting equality of rights, the Court, in concluding the opinion at page 406, said:

> "But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely

objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

Moreover, recently the Court has had under consideration the Civil Rights Act in *Hurd vs. Hodge*, 334 U.S., 24, and *Shelley vs. Kraemer*, 334 U. S., 1, and in the *Hurd* case, at page 34, recognizes the need for this Court, if necessary, exercising its power of supervision and correction, where there is involved so vital and important questions as the infringement of rights plainly protected by the provisions of the Civil Rights Act.

Obviously, it is the duty of the Court in this cause to see to it that the protection which the Constitution guarantees petitioner in selling and disposing of his property is not nullified by procedure which not only departs from the usual course of judicial procedure, but which is based on non-existent facts and the law applicable to those non-existent facts, rather than on the law applicable to the issue on which the action is predicated.

Here, the finding of evasion is attributable directly to the erroneous and unlawful procedure of the trial court. Had the proceedings been conducted in the usual course, in proof of the claim of evasion, a different finding would have resulted. Where, as in this case, there are completely integrated contracts for the sale of housing accommodations, evasion cannot be sustained, because the Constitution protects petitioner in his right to dispose of property in any way legal under the laws of Ohio. By the Civil

Rights Act, the Congress has assured him and all persons and citizens that they may demand the protection of those rights.

Constitutional provisions and safeguards may not be nullified and made ineffective by resorting to some novel and extreme and, at the same time, unlawful plan of judicial procedure, as was done in this case, on findings of unrelated and non-existent facts, to establish, as renting, certain contracts for the sale of real estate, recognized by the laws of Ohio and widely used in making sales of real property.

These are the elements which have produced the court's order, which prevents petitioner from selling his housing units, and is plainly in violation of the provisions of the Civil Rights Act. They present, for determination, the application of the Civil Rights Act to these findings and proceedings, originating in the trial court and sanctioned by the Appellate Court. They involve directly the question of petitioner's protected civil rights to dispose of his property, and clearly and plainly are these matters for the consideration of this Court, and the Court of Appeals having refused to give consideration to these questions, it is only through the medium of this Court's action and power of supervision that these civil rights may be protected.

II

While the petition here seeks this Court's review of the affirmance by the Court of Appeals of an interlocutory order, the fact that it is interlocutory should not, under the circumstances of this case, prevent its review here. The Court of Appeals refused to consider the merits, on the erroneous ground that on an appeal from an interlocutory order, the discretion of the trial court would not be disturbed, and failed and refused to recognize the want

of any discretion in the trial court, since the sole question before that court was a question of law—the determination of the legal status of these contracts with reference to evasion. It was the duty of the Court of Appeals to afford a real review and examination. The refusal of the Court of Appeals to consider the cause on the merits, as disclosed by the record, has defeated the purpose of this appeal from the interlocutory order, as provided by Judicial Code Sec. 129 (28 U.S.C.A., 227), when it should have been given precedence in the Court of Appeals and reviewed in June, 1949. It was brought to the attention of the Court of Appeals that petitioner herein (appellant there) claimed the lack of any authority or jurisdiction over the subject matter of these contracts, and that the injunction was an unlawful interference with his constitutional right to sell property. This is a vital and important question involving important legal and constitutional rights, fraught with financial losses, and *the reason why* the appeal was taken. He has a legal right to a review, and he has not had it.

Petitioner realizes that the Supreme Court is absolved from the duty of concerning itself with distinctly private interests, and that questions involving such are, as they should be, principally the responsibility of the Court of Appeals. The Court of Appeals could have resolved the questions involved and doubtless foreclosed the necessity of coming to this Court with this petition, but, having failed in that respect to give appellant the review allowed and provided by law, it surely is the duty of this Court to exercise its power of supervision and correction, to the end that the statutory review be afforded in this cause, and that a determination be made in accordance with the rules of substantive law.

As has been well said, technical advantages have no

place in the federal system of appellate review, and it seems to be the duty of the Supreme Court to exercise, if necessary, its power of supervision, to prevent any technical advantages obstructing the review provided by law and applicable to this cause.

Involved here, however, are the fundamental constitutional rights of this petitioner, and these rights cannot be invaded or transgressed by the application of unlawful and inapplicable principles of interpretation of legal instruments. In the end that constitutional questions cannot be separated from this cause and, as hereinbefore brought out, is one of the rights protected by the Civil Rights Act and is a question for the final determination of this Court.

III

Petitioner seeks this Court's review at this time to save time and expense attending further litigation. A trial on the merits and another appeal will bring up a record substantially the same as is now before the Court, at great cost of time and money.

The record before the Court is sufficient to enable the Court to pass upon the entire cause, including two minor claims not included in this appeal and which petitioner claims are without equity and on which there can be no recovery.

It is well established that the court, on appeal on an interlocutory order, may direct the complaint to be dismissed, if it appears from the pleading and the record that the plaintiff was not entitled to maintain his action, or insurmountable obstacles intervened. *Smith vs. Vulcan Iron Works*, 165 U. S., 518; *Mast Foos & Co. vs. Stover Manufacturing Company*, 177 U. S., 485; *Decker vs. Independence Shares Corporation*, 311 U. S., 282.

PRAYER

Wherefore, and for other reasons appearing and set forth in the petition-brief and petitioner's reply brief, hereinbefore filed, petitioner respectfully urges a re-hearing and re-consideration of the petition filed herein, or, in the alternative, that the cause be reversed and remanded to the Court of Appeals for the Sixth Circuit, with appropriate and proper instructions, to the end that a real examination and review be had in this cause, in the light of petitioner's constitutional rights as they are protected by the plain provisions of the Civil Rights Act, and for such other and further relief as the Court may deem proper under the circumstances.

Respectfully submitted,

ORIN C. CLEMENT,
302 Columbia Street,
Toledo, Ohio.
Attorney for Petitioner.

I, Orin C. Clement, petitioner herein, certify that, in my opinion, the foregoing petition for re-hearing in the case of *Clement vs. Woods,* No. 525, October Term, 1949, is well founded and is not presented for the purpose of creating a delay, but for the purpose of bringing to the Court's attention the important and vital question of his rights under the Constitution of the United States and under the Civil Rights Act enacted by Congress.

ORIN C. CLEMENT,